239

7

No. 05-746

FILED
SEP 7 - 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

NORFOLK SOUTHERN RAILWAY COMPANY,

Petitioner,

v.

TIMOTHY SORRELL,

Respondent.

On Writ of Certiorari to the Missouri Court of Appeals

BRIEF OF RESPONDENT

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Redwood Shores, CA 94065
(650) 801-5000

JEROME J. SCHLICHTER
ROGER C. DENTON
MARY L. PERRY
Counsel of Record
SCHLICHTER, BOGARD & DENTON
100 South Fourth Street
Suite 900
St. Louis, MO 63102
(314) 621-6115

September 7, 2006

Counsel for Respondent

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES iv

PRELIMINARY STATEMENT 1

STATEMENT OF THE CASE 2

A. Statutory Background 2

B. Factual Background 4

C. Trial Court 5

D. Missouri Court of Appeals 8

E. Missouri Supreme Court 10

SUMMARY OF ARGUMENT 11

ARGUMENT 12

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE NORFOLK SOUTHERN NEVER ARGUED IN THE STATE COURTS BELOW, OR IN ITS PETITION FOR CERTIORARI, AS IT DOES HERE, THAT THE FELA REQUIRES A PLAINTIFF TO PROVE PROXIMATE CAUSATION 12

II. THE FELA REQUIRES A RELAXED CAUSATION STANDARD FOR RAILROAD NEGLIGENCE, NOT PROXIMATE CAUSE AS NORFOLK SOUTHERN INCORRECTLY ASSERTS 20

A. Congress Lowered The Causation Standard For Railroad Negligence In Order To Serve The FELA's Purpose Of Facilitating Worker Recovery 22

B. In *Rogers*, This Court Held That The FELA Does Not Require Proof Of Proximate Causation for Railroad Liability 25

C. The Holding In *Rogers* Is Well-Established 27

1. *This Court Has Repeatedly Reaffirmed That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability* 27

2. *The Courts of Appeals Have Uniformly Recognized That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability* 29

D. *Rogers* Was Not Merely Concerned With Comparative Negligence 31

E. *Rogers* Is Consistent With The FELA Decisions That Came Before It 34

F. Norfolk Southern's Policy Arguments Do Not Justify Judicially Overruling *Rogers* In Violation of *Stare Decisis* 36

III. THE INSTRUCTION BELOW CONTAINING DUAL CAUSATION STANDARDS WAS NOT REVERSIBLE ERROR 40

A. The FELA Creates A Workable System Where The Causation Standard For The Railroad's Negligence Is Lighter Than That Applicable To Plaintiff's Contributory Negligence 40

B. Any Error In Instructing The Jury Using A Proximate Cause Standard For Contributory Negligence Was Harmless 46

CONCLUSION 47

TABLE OF AUTHORITIES

CASES — Page

Adams v. Robertson, 520 U.S. 83 (1997) 14, 47
Adarand Constructors, Inc. v. Mineta, 534 U.S. 103 (2001) 13
Bailey v. Central Vermont Railway, Inc., 319 U.S. 350 (1943) 23
Bailey v. Norfolk & W. Ry., 942 S.W.2d 404 (Mo. Ct. App. 1997) 39
Barth v. Coleman, 878 P.2d 319 (N.M. 1994) 43
Bisaillon v. Casares, 798 P.2d 1368 (Ariz. Ct. App. 1990) 42
Blazovic v. Andrich, 590 A.2d 222 (N.J. 1991) 43
Bonpua v. Fagan, 602 A.2d 287 (N.J. Sup. Ct. App. Div. 1992) 44
Campbell v. Louisiana, 523 U.S. 392 (1998) 13, 14
Cannon v. University of Chicago, 441 U.S. 677 (1979) 37
Caplinger v. Northern Pac. Terminal,, 418 P.2d 34 (Or 1966) 46
Carlisle Packing Co. v. Sandanger, 259 U.S. 255 (1922) .. 47
Carpenter v. City of Belle Fourche, 609 N.W.2d 751 (S.D. 2000) 3
City of Springfield v. Kibbe, 480 U.S. 257 (1987) 13, 19
Clark v. Mo. & N. Ark. R.R. Co., Inc., 157 S.W.3d 665 (Mo. Ct. App. 2004) 38
Comeau v. Lucas, 455 N.Y.S. 2d 871 (N.Y. App. Div. 1982) 44
Congress of Indus. Org. v. McAdory, 325 U.S. 472 (1945) 14
Consolidated Rail Corp. v. Gottshall, 512 U.S. 532 (1994) 3, 4, 22, 24, 27, 30, 41
Cook v. Caldwell Banker, 967 S.W.2d 654 (Mo. Ct. App. 1998) 15

Coray v. Southern Pac. Co., 335 U.S. 520 (1949) 20, 34
Crane v. Cedar Rapids & Iowa City Railway Co., 395 U.S. 164 (1969) 27
Cusson v. Canadian Pacific Ry. Co., 115 F.2d 430 (2d Cir. 1940) 36
Deery v. Cray, 77 U.S. 263 (1869) 47
Dennis v. Denver & Rio Grande W. R.R. Co., 375 U.S. 208 (1963) 28
Duignan v. United States, 274 U.S. 195 (1927) 13
E. Transp. Line v. Hope, 95 U.S. 297 (1877) 47
Eagle v. Redmond, 80 S.W.3d 920 (Mo. Ct. App. 2002) 16
Eglsaer v. Scandrett, 151 F.2d 562 (7th Cir. 1945) 36
Eickelman v. Illinois Cent. Gulf R. Co. 714 S.W. 2d 611 (Mo. Ct. App. 1986) 38
Fare v. S. Ry. Co., 438 F2d 933 (11th Cir. 1971) 31
Fitzgerald v. United States Lines Co., 374 U.S. 16 (1963) 45
Fletcher v. Union Pac. R.R. Co., 621 F.2d 902 (8th Cir. 1980) 30
Gallick v. Baltimore & Ohio Railroad Co., 372 U.S. 108 (1963) 27
Gautreaux v. Scurlock Marine, Inc., 107 F.3d 331 (5th Cir. 1997) 30
Heater v. Chesapeake & Ohio Ry. Co., 497 F.2d 1243 (7th Cir. 1974) 37
Heath v. Alabama, 474 U.S. 82 (1985) 14
Herb v. Pitcairn, 324 U.S. 117 (1945) 14
Hernandez v. Trawler Miss Vertie Mae, Inc., 187 F.3d 432 (4th Cir. 1999) 30
Hertz v. Raks Hospitality, Inc., 196 S.W.3d 536 (Mo. Ct. App. 2006) 16
Hickey v. Zezulka, 487 N.W.2d 106 (Mich. 1992) 43, 44

Hilton v. South Carolina Public Railways Com'n, 502 U.S. 197 (1991) 37
Hines v. Consol. Rail Corp., 926 F.2d 262 (3d Cir. 1991) 30
Holbrook v. Norfolk S. Ry. Co., 414 F.3d 739 (7th Cir. 2005) 30
Holmes v. Securities Investor Protection Corp., 503 U.S. 258 (1992) 41
Howard v. Ill. Cent. R.R. Co., 207 U.S. 463 (1908) 2
Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) 37
Illinois v. Gates, 462 U.S. 213 (1983) 14
Illinois v. McArthur, 531 U.S. 326 (2001) 13
Inman v. Baltimore & Ohio R.R. Co., 361 U.S. 138 (1959) 28
Kernan v. American Dredging Co., 355 U.S. 426 (1958) 28
Little v. Nat'l R.R. Passenger Corp., 865 F.2d 1329 (Table), 1988 WL 145095, 1 (D.C. Cir. 1988) 31
McGoldrik v. Compagnie Generale, 309 U.S. 430 (1940) 14
Messick v. Atchison, Topeka & Santa Fe Ry. Co., 924 S.W.2d 620 (Mo. Ct. App. 1996) 38
Miller v. Am. President Lines, Ltd., 989 F.2d 1450 (6th Cir.1993) 45
Mohawk Indus. Inc. v. Williams, 126 S. Ct. 2016 (2006) 15
Monessen Southwestern Ry. Co. v. Morgan, 486 U.S. 330 (1988) 37
Morris v. Yogi Bear's Jellystone Park Camp Resort, 539 So.2d 70, 77-78 (La. Ct. App. 1989) 44
Mulherin v. Ingersoll-Rand Co., 628 P.2d 1301 (Utah 1981) 45
Napier v. F/V DEESIE, Inc., 454 F.3d 61 (1st Cir. 2006) 30
NCAA v. Smith, 525 U.S. 459 (1999) 13

Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135 (2003) 3, 21, 27, 39, 41, 42
O'Day v. Chicago River & Ind. R.R. Co., 216 F.2d 79 (7th Cir. 1954) 36
Ohio v. Robinette, 519 U.S. 33 (1996) 20
Oglesby v. S. Pac. Transp. Co., 6 F.3d 603 (9th Cir. 1993) 31
Page v. St. Louis Southwestern Ry. Co., 349 F.2d 820 (5th Cir. 1965) 46
Palsgraf v. Long Island R.R. Co., 162 N.E. 99 (N.Y. 1928) 41
Parker v. Atchison, Topeka & Santa Fe Railway, 263 Cal. App. 2d 675 (Cal. Ct. App. 1968) 38
Pennsylvania R. Co. v. Illinois Brick Co., 297 U.S. 447 (1936) 14
Peters v. CSX Transp., Inc., No. 04-CV-077, 2006 WL 42179 (W.D. Ky. Jan. 3, 2006) 39
Pope & Talbot, Inc. v. Hawn, 346 U.S. 406 (1953) 44
Randall v. Sorrell, 126 S. Ct. 2479 (2006) 36
Richards v. Consol. Rail Corp., 330 F.3d 428 (6th Cir. 2003) 30
Rogers v. Missouri Pac. R.R. Co., 352 U.S. 500 (1957) ..... *passim*
Rogers v. Missouri Pac. R.R. Co., 284 S.W.2d 467 (Mo. 1955) 25, 26, 30, 31, 32, 34, 36
Schulz v. Pa. R.R. Co., 350 U.S. 523 (1956) 35
Seas Shipping Co. v. Sieracki, 328 U.S. 85 (1946) 44
Socony-Vacuum Oil Co. v. Smith, 305 U.S. 424 (1939) 44
Sprietsma v. Mercury Marine, 537 U.S. 51 (2002) 13
State Farm Mut. Auto. Ins. Co. v. Duel, 324 U.S. 154 (1945) 14
Summers v. Mo. Pac. R..R.. Sys., 132 F.3d 599 ..... 20, 30
Syverson v. Consol. Rail Corp., 19 F.3d 824 (2d Cir. 1994) 30

Tiller v. Atlantic Coast Line R.R. Co., 318 U.S. 54 (1943) 22
Travis v. Kansas City S. Ry. Co., 977 S.W.2d 512 (Mo. Ct. App. 1998) 38
Turner v. Norfolk & Western Ry. Co., 785 S.W.2d 569 (Mo. Ct. App. 1990) 38
United States v. Bestfoods, 524 U.S. 51 (1998) 13
Urie v. Thompson, 337 U.S. 163 (1949) 3, 4
York v. Missouri Pacific R. Co., 813 S.W.2d 61 (Mo. Ct. App. 1991) 38
Youakim v. Miller, 425 U.S. 231 (1976) 13
Webb v. Webb, 451 U.S. 493 (1981) 14
Wilkerson v. McCarthy, 336 U.S. 53 (1949) 22
Williams v. Long Island R.R. Co., 196 F.3d 402 (2d Cir. 1999) 30
Wilmoth v. Chicago, Rock Island & Pac. R.R., 486 S.W.2d 631 (Mo. 1972) 15
Wolfe v. North Ca., 364 U.S. 177 (1960) 14

STATUTES

45 U.S.C. §§ 51-55 22
45 U.S.C. § 51 ..... 1, 3, 4, 20, 27, 41
45 U.S.C. § 53 ..... 3, 41, 42
45 U.S.C. § 54 ..... 4, 24, 41
45 U.S.C. § 60 4
N.D. Cent. Code §32-03.2-02 (1993) 44

RULES

Mo. Sup. Ct. R. 70.03 15
Mo. Sup. Ct. R. 83.08(b) 17
Mo. Sup. Ct. R. 84.04(e) 16

LEGISLATIVE HISTORY

S. Rep. No. 60-460 (1908) 4, 22, 24
S. Rep. No. 84-661 (1939) 39
H.R. Rep. No. 60-1386 (1908) 3, 4, 22, 45
H.R. Rep. No. 75-2153 (1938) 24
40 Cong. Rec. 4605 (1906) 2
40 Cong. Rec. 4607 (1906) 2
42 Cong. Rec. 4527 (1908) 3, 22
42 Cong. Rec. 4536 (1908) 3, 22

SCHOLARLY AUTHORITY

Dan B. Dobbs, *The Law of Torts* (2001) 41
Romualdo P. Eclavea, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R. 4th 633 (1981 & Supp. 2005) 44
W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* (5th ed. 1984) 41
Summary of the Laws of Other Countries on the Subject of Workmen's Compensation, 62nd Cong., 2d Sess. No. 643 (May 2, 1912) 3
Charles H. Traeger, III, *Legal Cause, Proximate Cause, & Comparative Negligence in the FELA*, 18 STAN. L. REV. 929 (1966) 43

OTHER AUTHORITIES

Missouri Approved Jury Instruction 17.01 (6th ed. 2002) 9
Missouri Approved Jury Instruction 24.01 (6th ed. 2002) 9
Missouri Approved Jury Instruction 32.07 (6th ed. 2002) 7, 8, 9, 10, 17
Restatement (Second) of Torts (1965) 43
Restatement (Third) of Torts: Product Liability (1998) 44

PRELIMINARY STATEMENT

Section 1 of the Federal Employers' Liability Act ("FELA" or "Act") provides that a railroad will be "liable in damages to any person suffering injury while he is employed by such carrier . . . for such injury . . . resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier." 45 U.S.C. § 51. Consistent with *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957), and, in fact, relying on that decision, Respondent Norfolk Southern Railway Company repeatedly argued in the courts below that the FELA's "in whole or in part" language lightened the causation standard for railroad liability. Indeed, Norfolk Southern objected only to a jury instruction regarding contributory negligence, because it understood that instruction to require proof of proximate causation, and it remained silent in the face of an instruction regarding railroad negligence that incorporated the FELA's "in whole or in part" language. Such failure to object is an absolute waiver under Missouri state law of any challenge to the instruction on railroad negligence. It is only in this Court, and only in its merits brief, not in its Petition for Writ of Certiorari, that Norfolk Southern, for the first time, argues that this statutory language in the negligence instruction – language which it previously thought the jury would interpret as relaxing the causation standard for contributory negligence if it were included in that instruction – does not authorize liability on a showing of less than proximate cause.

Norfolk Southern's support for a proximate causation standard for railroad negligence comes too late, and, in any event, is manifestly contrary to this Court's prior decisions, the courts of appeals' uniform interpretation of the FELA, and the policy purposes of the Act. Norfolk Southern has offered no justification for abandoning this Court's long and

well-established interpretation that the FELA does not require proof of proximate causation for railroad liability.

The only other potential issue in this case – whether a lightened causation standard applies to plaintiff's contributory negligence in an FELA case – has been abandoned by Norfolk Southern in its pursuit of a proximate cause standard for defendant's negligence. In any event, nothing in the FELA suggests that Congress intended to lighten the causation standard for plaintiff's contributory negligence. To do so would in fact be counter to Congress' express purpose to shift financial responsibility for injuries from the workers to the railroad.

STATEMENT OF THE CASE

A. Statutory Background

In response to the horrific number of injuries and deaths that were occurring on a regular basis in the railroad industry, Congress, in 1906, enacted a precursor to the FELA. 40 Cong. Rec. 4607 (1906) (expressing desire to "do something toward stopping the fearful slaughter of human life and destruction of human limbs by our railroads"). In that statute, as in the later FELA, Congress imposed liability on the railroads for their employees' injuries. *See Howard v. Ill. Cent. R.R. Co.*, 207 U.S. 463, 490 n.1 (1908). Congress hoped that by creating such liability it would encourage the railroads to take "reasonable care" of their employees. *See* 40 Cong. Rec. 4605 (1906) ("The only manner in which they can be persuaded to take reasonable care of their employees is by holding them responsible in damages for the absence of such care."); *see also* ("Were they held liable to one servant for the injuries suffered through the negligence of another in the running service they would exercise greater care.").

In 1908, this Court held that the 1906 statute exceeded Congress' legislative authority. *See Howard,* 207 U.S. at 500, 504. Reflecting the importance of the statutory protec-

tion created just two years earlier, Congress, within months, proposed the FELA as a replacement to the 1906 statute. *See e.g.,* H.R. Rep. No. 60-1386 (1908).

During deliberations leading to the enactment of the FELA, Congress decried the lack of a system in the United States for compensating railroad workers for their injuries, explaining that European countries had adopted such systems a generation earlier. 42 Cong. Rec. 4527, 4536 (1908). Although Congress expressed a desire to bring this country's laws up to the liberal standards of Europe, it did not adopt a worker's compensation system, as the European countries had done. *See, e.g., Summary of the Laws of Other Countries on the Subject of Workmen's Compensation*, 62nd Cong., 2d Sess. No. 643 at 8, 28, 29 (May 2, 1912) (Austria: all injuries compensated unless intentionally caused; Belgium: same; Britain: all injuries compensated unless due to worker's serious and willful misconduct). Nevertheless, in enacting the FELA, Congress implemented a system that moved railroad-worker protection away from the traditional common law and closer to the workers' compensation model. *See* 45 U.S.C. §§ 51, 53. Significant features of Congress' proposed new Act included its creation of liability for any injury "resulting in whole or in part" from the employer's negligence and its abrogation of the defense of pure contributory negligence, which had previously barred a plaintiff's recovery if his negligence played any role in his injuries. *See* 45 U.S.C. §§ 51, 53; *see, e.g., Carpenter v. City of Belle Fourche,* 609 N.W.2d 751, 758 n.4 (S.D. 2000) (any negligence by plaintiff would preclude recovery under pure contributory negligence).

These features of the FELA reflected Congress' goal to shift financial responsibility for injured railroad workers from those least able to carry that burden – the worker and his family – to the railroads. *See Norfolk & W. Ry. Co. v. Ayers,* 538 U.S. 135, 161 (2003); *Consol. Rail Corp. v. Gottshall,* 512 U.S. 532, 542 (1994); *see generally Urie v.*

Thompson, 337 U.S. 163, 181 (1949).[1] Indeed, Congress rejected attempt after attempt to introduce features in 1908 to the FELA that would limit this remedial function. *See, e.g.*, H.R. Rep. No. 60-1386, at 79, 80 (proposal to limit the FELA to extrahazardous railroading risks); *id.* at 92 (proposal to grant courts the discretionary power to order plaintiff's physical examination).

Consistent with these goals, the next significant substantive changes to the Act, which came in 1939, further ensured the financial protection of injured railroad workers by expanding the class of covered employees, eliminating the defense of assumption of the risk, and penalizing intimidation of workers who provide information about accidents. *See* 45 U.S.C. §§ 51, 54, 60. In the intervening decades, this Court has consistently recognized that Congress' avowedly beneficial purpose in enacting the FELA requires a policy of liberal construction so as to accomplish that purpose. *See Urie*, 337 U.S. at 180; *see also Gottshall*, 512 U.S. at 543.

B. Factual Background

On November 1, 1999, Respondent Timothy Sorrell sustained serious injuries when his nine-foot wide company truck flipped onto its side after another nine-foot wide truck driven by Norfolk Southern employee Keith Woodin attempted to pass on a sixteen-foot wide gravel road. Trial Transcript ("Tr.") 276-77, 405, 413-15, 418; Trial Exhibit ("Exh.") 13. Only invasive surgery, which involved placing a metal cage in his neck, has provided any measure of relief for the neck and shoulder pain Sorrell has experienced since the accident. *Id.* at 341-42, 346-47, 429-30, 432-35. He con-

---

[1] *See also* S. Rep. 60-460, at 3 (1908) (statute intended to "adjust[] the losses and injuries inseparable from industry and commerce to the strength of those who in the nature of the case ought to share the burden.")

tinues to experience debilitating lower back pain during most everyday activities. *Id.* at 437-38, 446-47, 545.

As a consequence, Norfolk Southern has concluded that Sorrell is no longer physically able to work as a trackman. *Id.* at 442. Moreover, it will not permit him to apply for any other position within the company, because, with only a tenth-grade education, Sorrell failed the requisite examinations. *Id.* at 392, 442. Sorrell therefore lost his job and the health insurance upon which he and his wife, who has multiple sclerosis, relied. *Id.* at 438-40, 442, 545-46, 561.

Sorrell brought suit against Norfolk Southern in Missouri state court under the FELA, alleging that it negligently failed to provide him with, *inter alia*, a reasonably safe place to work, and that its negligence resulted in his severe injuries. Legal File ("L.F.") 9.[2] Sorrell sought damages to compensate for his medical expenses, lost wages, and the pain and suffering that resulted from this permanent disability. *Ibid.*

C. Trial Court.

Evidence. At trial, Sorrell testified that, while he was driving a load of coal patch to various railroad crossings, he saw another truck approaching at approximately 30 miles per hour from the opposite direction. Tr. 405, 409, 412-13. Sorrell grew concerned because the driver of the other truck, who he later learned to be Woodin, did not noticeably slow his truck, did not take advantage of the multiple opportunities he had to pull the truck off the road into a driveway or a temporary extra lane, and did not even appear to move the truck closer to the side of the road. *Id.* at 413, 418. Fearful that the two trucks could not pass each other on this narrow road, Sorrell pulled his truck as close to the right side of the road

---

[2] Sorrell also asserted a claim under the FELA for injuries arising from his use of a tamping tool. L.F. 10-11. This claim is not before this Court.

as possible, slowing it to approximately five miles per hour. *Id.* at 413-14.[3]

Sorrell explained that after the cabs of the two trucks had passed one another, he tried to drive his truck toward the center of the road, but the front tire on the passenger side "washed out," and the front end dropped, causing the back end of the truck to lurch upward, the truck's load of coal patch to shift, and the truck to flip onto its side. *Id.* at 414-15. As the truck "jerked" him sideways, Sorrell hung "on for dear life." *Id.* 409, 415-16. When the truck came to rest, Sorrell released his lap belt – the only restraint system provided in the late-model truck he was driving – and fell backwards onto the truck's center console. *Id.* at 407-08, 415-16.

At trial, Woodin recounted a different version of events. Contrary to his written statement immediately after the accident, *see* Exh. 7, Woodin testified that he pulled his truck off the road and stopped when he was 400 to 500 feet from Sorrell. Tr. 239-40. Woodin stated that while waiting for Sorrell to pass, he saw Sorrell's truck veer to its right, causing the truck's front passenger-side wheel to drop off the road. *Id.* at 240. Woodin then drove past Sorrell, turned around, and came back to park behind Sorrell's truck. *Id.* at 241-44. By then, however, Sorrell's truck had tumbled into the ditch. *Id.* at 242-44.

Jury Instructions & Verdict. On the last day of witness testimony, the trial court discussed the jury instructions with the parties. Tr. 571-78. Sorrell submitted, and the trial court approved without objection from Norfolk Southern, Instruction No. 12 regarding railroad negligence, which conformed to Missouri Approved Instruction ("MAI") 24.01.[4] *Id.* 573.

---

[3] Sorrell took this course of action because Norfolk Southern had not instructed him on the appropriate procedures to take if he encountered a truck on such a narrow road. Tr. 407.

[4] MAI 24.01 states:

This instruction provided, in relevant part, that the jury must find for Sorrell if Norfolk Southern's negligence "*resulted in whole or in part* in injury to [him]." Joint Appendix ("J.A.") 14 (emphasis added). Sorrell also submitted (and the trial court approved, although this time over Norfolk Southern's objection) Instruction No. 13 regarding contributory negligence, which conforms to MAI 32.07(B).[5] Tr. 573, 576-77; J.A. 11. This instruction provided, in relevant part, that the jury must find Sorrell contributorily negligent if his negligence "*directly contributed* to the cause of his injury," J.A. 15 (emphasis added). In contrast, the alternative, non-MAI instruction (Instruction No. A) that Norfolk Southern

---

Your verdict must be for plaintiff if you believe:

First, plaintiff was an employee of defendant and a part of his employment in some way closely and substantially affected interstate commerce, and

Second, [with respect to such conditions for work,] defendant either failed to provide:

reasonably safe conditions for work, or reasonably safe appliances, or reasonably safe methods of work, or reasonably adequate help, and

Third, defendant in any one or more of the respects submitted in Paragraph Second was negligent, and

Fourth, such negligence resulted in whole or in part in [injury to plaintiff] [the death of (*decedent's name*)].

[5] MAI 32.07(B) states:

You must find plaintiff contributorily negligent if you believe:

First, plaintiff (characterize the act of negligence, such as "failed to keep a lookout for oncoming trains"), and

Second, plaintiff was thereby negligent, and

Third, such negligence of plaintiff directly contributed to cause his injury.

offered, but which the trial court refused to give, would have allowed the jury to find Sorrell contributorily negligent if his negligence "*contributed in whole or in part to cause his injury.*" J.A. 11 (emphasis added); *see also* Tr. 574-76.

Later that day, Norfolk Southern renewed its objection to the contributory negligence instruction, and the trial court again overruled it. Tr. 633.[6] After deliberations, the jury returned a verdict in favor of Sorrell, awarding him $1.5 million in damages. L.F. 6, 44.

Motion for New Trial. Norfolk Southern thereafter filed a motion for new trial, in which it renewed its contention that the trial court "erred in rejecting Defendant's Tendered Instruction A and giving Instruction 13, based upon MAI 32.07(B)." L.F. 76. Again, Norfolk Southern neither contested the negligence instruction nor argued that proximate cause was the appropriate standard for evaluating negligence or contributory negligence under the FELA. The trial court denied Norfolk Southern's motion. L.F. 189.

D. Missouri Court of Appeals.

On appeal to the Missouri Court of Appeals, Norfolk Southern argued the trial court had erred by giving the contributory negligence instruction because it:

> Misstates the FELA causation standard for contributory negligence in that it instructed the jury to find plaintiff negligent only if it

---

[6] Norfolk Southern mentioned the negligence instruction while objecting that "there is no connection between any failure of Norfolk Southern to provide Mr. Sorrell with a reasonably safe place to work . . . as far as causing his injury." Tr. 633. Norfolk Southern, however, never objected to the form of the negligence instruction, and, in fact, it conceded that the record included sufficient evidence that Woodin's potentially negligent driving caused Sorrell's injury such that the question of liability had to be submitted to the jury. *Ibid.*

> concluded that his negligence 'directly contributed to cause his injury' rather than caused his injury 'in whole or in part.'

Appellant's Opening Brief ("Br.") 2, 26 (capitalization removed). To support its position, Norfolk Southern relied on this Court's decision in *Rogers*, which it characterized as holding that:

> the railroad employer could be held liable if its negligence played any role in producing the employee's injury, even if there were a number of other causes that may also have contributed to causing the injury.

Br. at 30. Norfolk Southern, conceding the point that it now contests, continued:

> In other words, *the traditional proximate cause test* – ordinarily submitted in MAI by language requiring the jury to find that 'as a direct result' of the defendant's negligence the plaintiff sustained damage, *see, e.g.*, MAI 17.01 – *is not appropriate in an FELA case.*

Br. at 30 (emphasis added).

In an unpublished memorandum opinion, the Missouri Court of Appeals affirmed the trial court's judgment. Petition Appendix ("Pet. App.") 21a. The Court of Appeals understood Norfolk Southern to contend that the contributory negligence instruction "*misstates the causation standard for contributory negligence in a FELA case* because" it is inconsistent with the "in whole or in part" language from MAI 24.01. *Id.* at 5a (emphasis added). The court held, however, that the Missouri Supreme Court had determined that MAI 32.07(B) – which the trial court followed – set forth the appropriate standard for contributory negligence in a FELA case. *Id.* at 7a.

Norfolk Southern next moved for rehearing and/or transfer to the Missouri Supreme Court. In its Motion for Rehearing, Norfolk Southern noted that in the trial court it had "objected to [the contributory negligence instruction] as contrary to the FELA," and it contended that if its:

> Instruction No. A had been given, the jury would have applied the same standard of causation to the plaintiff's negligence that it was instructed to apply to the defendant's negligence.

Motion for Rehearing at 2, 3.

Similarly, in its Motion to Transfer, Norfolk Southern stated, point blank, that "MAI 32.07(B) is simply wrong in applying the traditional proximate cause standard to comparative negligence in FELA case." Motion to Transfer at 10. Thus, two more times, Norfolk Southern indicated its preference for the Missouri Supreme Court's instruction regarding railroad negligence ("in whole or in part") over the proximate cause that is required to prove a plaintiff's contributory negligence, thus clearly approving the relaxed employer causation standard that it now seeks to challenge.

The Missouri Court of Appeals denied rehearing and transfer to the Missouri Supreme Court. Pet. App. 32a.

E. Missouri Supreme Court.

Norfolk Southern next filed an Application to Transfer, which is similar to a petition for certiorari, with the Missouri Supreme Court. In its application, which largely tracks the transfer motion filed with the Missouri Court of Appeals, Norfolk Southern, once again conceding the applicability of the relaxed standard for employer causation, argued that:

> MAI 32.07(B), the approved instruction for submitting contributory negligence in an FELA case, uses the traditional 'proxi-

> mate cause' standard of causation *rather than the more relaxed FELA standard of causation.*

Application for Transfer at 2 (emphasis added). Moreover, Norfolk Southern again cited this Court's decision in *Rogers* for the proposition that "*the traditional proximate cause test . . . is not appropriate in an FELA case.*" Application for Transfer at 5 (emphasis added).

The Missouri Supreme Court denied transfer in a summary order. Pet. App. 31a.

SUMMARY OF ARGUMENT

At every stage of this litigation, until its merits brief in this Court, Norfolk Southern disavowed proximate cause as the causation standard for railroad negligence. Instead, it embraced the lightened causation standard for employer negligence set forth in this Court's decision in *Rogers v. Missouri Pacific Railroad Co.*, 352 U.S. 500 (1957). By abandoning its prior interpretation of *Rogers*, as it now does, Norfolk Southern raises an issue it never raised in the state court or in its Petition for Certiorari. Norfolk Southern's failure to preserve this issue is more than a matter of waiver. It implicates jurisdictional and prudential considerations and compels dismissal of the writ.

Not only has Norfolk Southern failed to preserve this issue for this Court's consideration, but the interpretation of *Rogers* that Norfolk Southern advanced in the state court was correct – proximate causation does not apply to employer negligence. *Rogers'* conclusion that a lightened causation standard, rather than traditional proximate cause, applies to railroad negligence finds support in both the language and the beneficial purpose of the FELA.

Norfolk Southern obtained this Court's grant of certiorari on a different question – whether a lightened causation standard applies to plaintiff's contributory negligence. Norfolk

Southern has abandoned that claim. As matters now stand, for this Court to find in favor of Norfolk Southern based on its current interpretation of *Rogers* and the causation standard for defendant's negligence, the Court must find that the Missouri instruction on contributory negligence was appropriate, the only instruction Norfolk Southern challenged in the state court and in its Petition. In other words, Norfolk Southern now agrees that the Missouri courts committed no error on the only issue presented to them.

And, in fact, the Missouri courts made no such error. In enacting the FELA, Congress created a system that departs from the common law in order to shift liability for injuries from the workers to the railroad. Allowing a lightened causation standard for plaintiff's contributory negligence finds no support in the statute and would subvert Congress' goals.

Finally, under the facts of this case, Norfolk Southern could not have been prejudiced by the Missouri comparative negligence instruction as Sorrell's only potential negligence was in the manner he drove the truck before it fell off the road. If the jury found such driving to constitute negligence, that negligence would be a cause of his injuries under any standard.

ARGUMENT

I. THE WRIT OF CERTIORARI SHOULD BE DISMISSED AS IMPROVIDENTLY GRANTED BECAUSE NORFOLK SOUTHERN NEVER ARGUED IN THE STATE COURTS BELOW, OR IN ITS PETITION FOR CERTIORARI, AS IT DOES HERE, THAT THE FELA REQUIRES A PLAINTIFF TO PROVE PROXIMATE CAUSATION.

Norfolk Southern contends in this Court, for the first time in this case, that the FELA requires a plaintiff to show that the railroad's negligence proximately caused his injuries. In the courts below, Norfolk Southern argued just the opposite,

wholeheartedly embracing the relaxed causation standard for railroad negligence but asking that the same relaxed causation standard be applied to plaintiff's contributory negligence. Norfolk Southern thus never gave the state courts below any opportunity to consider its current contention, made for the first time in the Brief of Petitioner, that proof of railroad negligence requires proximate causation. This default compels dismissal of the writ.

This Court has said time and time again that it "ordinarily 'do[es] not decide in the first instance issues not decided below.'" *Adarand Constructors, Inc. v. Mineta*, 534 U.S. 103, 109 (2001) (quoting *NCAA v. Smith*, 525 U.S. 459, 470 (1999)).[7] This reluctance to consider issues not presented to the lower court is particularly acute when the issue concerns a jury instruction to which the party did not object in the trial court. *See City of Springfield v. Kibbe*, 480 U.S. 257, 259-60 (1987) (per curiam). In such a case there exists "considerable prudential objection to reversing a judgment because of instructions that petitioner accepted." *Id.* at 259 (dismissing the writ).

In cases arising from the state courts, considerations of federalism and comity further compel the refusal to consider

---

[7] *See, e.g., Sprietsma v. Mercury Marine*, 537 U.S. 51, 56 n.4 (2002) (refusing to consider argument that maritime law governed where not raised in the lower courts); *Illinois v. McArthur*, 531 U.S. 326, 334-35 (2001) (refusing to consider argument that state lacked probable cause where respondent expressly conceded probable cause below); *United States v. Bestfoods*, 524 U.S. 51, 72 (1998) (refusing to "decid[e] in the first instance an issue on which the trial and appellate courts did not focus"); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("It is only in exceptional cases coming here from the federal courts that questions not pressed or passed upon below are reviewed.") (quoting *Duignan v. United States*, 274 U.S. 195, 200 (1927)).

issues not raised below. This Court has repeatedly declined to consider issues not advanced in the state courts from which a case arises, whether on the ground that such waiver deprives the Court of jurisdiction,[8] or because it creates a "weighty presumption against review," *see Heath v. Alabama*, 474 U.S. 82, 87 (1985); *Campbell v. Louisiana*, 523 U.S. 392, 403 (1998); *Illinois v. Gates*, 462 U.S. 213, 218 (1983).[9] Such decisions rest on respect for the state courts' institutional autonomy; this Court has deemed it "unseemly" to disturb the finality of state judgments on a ground that the state court did not have occasion to consider. *See, e.g., Adams v. Robertson*, 520 U.S. 83, 90 (1997); *Webb*, 451 U.S. at 500.

This case falls squarely within these precedents. The Missouri courts at no time had any opportunity to consider Norfolk Southern's newly-minted claim that the FELA requires proof of proximate causation in order to establish a railroad's negligence. Accordingly, Norfolk Southern repeatedly and irreversibly waived its current claim, and the writ should be dismissed as improvidently granted.[10]

---

[8] *See, e.g., Webb v. Webb*, 451 U.S. 493, 496-97, 501-02 (1981); *Congress of Indus. Org. v. McAdory*, 325 U.S. 472, 477 (1945); *State Farm Mut. Auto. Ins. Co. v. Duel*, 324 U.S. 154, 160 (1945); *McGoldrick v. Compagnie Generale*, 309 U.S. 430, 434 (1940).

[9] This Court similarly lacks jurisdiction to review state-court judgments that rest on adequate and independent state grounds, even if the state ground is the appellant's failure to comply with state procedural rules. *See Wolfe v. North Ca.*, 364 U.S. 177, 196 (1960); *see also Herb v. Pitcairn*, 324 U.S. 117, 125-26 (1945); *Pennsylvania R. Co. v. Illinois Brick Co.*, 297 U.S. 447, 463 (1936). The reason is simple: "if the same judgment would be rendered by the state court after [this Court] corrected its view of federal laws, [this Court's] review could amount to nothing more than an advisory opinion." *Herb*, 324 U.S. at 126.

[10] As recently as last Term, this Court dismissed a petition as improvidently granted where, as the respondent there explained, the

First, at trial, Norfolk Southern declined to object to the railroad negligence instruction as required under state law, even though the instruction employed the FELA's "in whole or in part" language, which the Missouri courts have interpreted as not requiring proof of proximate causation. *See* Tr. 571-78; *Wilmoth v. Chicago, Rock Island & Pac. R.R.*, 486 S.W.2d 631, 634 (Mo. 1972). Indeed, Norfolk Southern urged the trial court to use that very instruction as the model for instructing the jury on contributory negligence, faulting the trial court for *applying* a proximate causation requirement to the contributory negligence defense, not the other way around. *See* J.A. 11 (court refused to give contributory negligence instruction that used the language "in whole or in part"); *see also* Tr. 574-76; L.F. 76. Thus this case presents more than a waiver. It involves an affirmative argument in the court below that the standard Norfolk Southern now challenges was the appropriate standard to use. As the instruction on defendant's negligence was the only way in which the issue Norfolk Southern now presents could have had any impact on the jury's verdict, Norfolk Southern's failure to raise a "specific objection" to the instruction that stated "distinctly the matter objected to and the grounds of the objection" forever waived any claim it might now have with respect to the appropriate causation standard for railroad negligence. *See* Mo. Sup. Ct. R. 70.03; *see also Cook v. Caldwell Banker*, 967 S.W.2d 654, 658 (Mo. Ct. App. 1998) (refusing to review alleged instructional error where contention on appeal differed from objection made at trial).

Second, Norfolk Southern compounded that waiver in the trial court by failing to include in its motion for new trial any

---

"opening brief all but abandon[ed]" the question on which the petitioner had obtained certiorari and instead asserted an issue that petitioner "had affirmatively conceded . . . in the lower courts." Brief of Respondent at 12, *Mohawk Indus. Inc. v. Williams*, 126 S. Ct. 2016 (2006) (No. 05-465).

challenge to the defendant's negligence instruction. *See* Mo. Sup. Ct. R. 70.03; *Hertz v. Raks Hospitality, Inc.*, 196 S.W.3d 536, 546 (Mo. Ct. App. 2006) (claim of instructional error not preserved when not reasserted in motion for new trial).

Third, in the Missouri Court of Appeals, Norfolk Southern continued to object only to the contributory negligence instruction, accepting the failure to require proximate cause in the railroad negligence instruction and going so far as to state expressly that "*the traditional proximate cause test . . . is not appropriate in an FELA case.*" Br. at 30 (emphasis added). Under Missouri's procedural rules, Norfolk Southern's failure to object to the negligence instruction or advocate a proximate cause standard in its appellate brief constituted an additional irreversible abandonment of those arguments. *See* Mo. Sup. Ct. R. 84.04(e) (limiting appellate review to errors included in "Points Relied On"); *Eagle v. Redmond*, 80 S.W.3d 920, 923-27 (Mo. Ct. App. 2002) (noting that even if an argument is raised in the Points Relied On, a party waives the argument by not advancing it in the text of the brief).

Fourth, in its motion for rehearing before the Court of Appeals, Norfolk Southern again neither voiced objection to the negligence instruction nor argued that proximate causation was the appropriate standard for the FELA cases. Moreover, again it affirmatively argued that the causation standard for railroad negligence is a lesser one. *See* Motion for Rehearing 2-3 (restating an objection to the *contributory* negligence instruction as "contrary to the FELA" because its causation standard was *higher* than that required for railroad negligence).

Finally, in seeking transfer to the Missouri Supreme Court, Norfolk Southern again held fast to its position that only the contributory negligence instruction, not the railroad negligence instruction, was incorrect, telling the court that

"MAI 32.07(B) is simply wrong in applying the traditional proximate cause standard to comparative negligence in FELA cases." *See* Motion to Transfer at 10; Application for Transfer at 2 (contending that the trial court's contributory negligence instruction misstates the FELA causation standard because it "uses the traditional 'proximate cause' standard of causation *rather than the more relaxed FELA standard of causation*") (emphasis added). Indeed, under Missouri law, Norfolk Southern could not have changed its position at this stage even if it had wanted to. *See* Mo. Sup. Ct. R. 83.08(b) (prohibiting parties from altering "the basis of any claim that was raised in the court of appeals brief").

Norfolk Southern did not present its current issue in the Petition for Certiorari, either. Consistent with its focus in the state courts on relaxing the causation standard for plaintiff's contributory negligence, Norfolk Southern's question presented in the Petition asked "[w]hether the court below erred in determining . . . that the causation standard for employee *contributory negligence* under the Federal Employers Liability Act ('FELA') differs from the causation standard for railroad *negligence*." Pet. i. In its brief, however, Norfolk Southern flips the order of clauses in the question presented to reflect its new focus on escalating the causation standard for the railroad's negligence, now rephrasing the question presented as "[w]hether the court below erred in determining that the causation standard for railroad *negligence* under the Federal Employers Liability Act ('FELA') differs from the causation standard for employee *contributory negligence*." Br. of Pet'r at i.

Norfolk Southern's emphasis in the petition, and throughout this case in the Missouri courts, on changing the contributory negligence standard, rather than the employer's negligence standard, is also apparent from its invocation of a "conflict" among multiple courts of appeal as a reason justifying this Court's review. As proof of this contention, Norfolk Southern cited cases concluding that plaintiff's causation

standard should mirror *the lightened causation standard* applicable to defendant's negligence.[11]

Norfolk Southern now suddenly has changed its tune. It no longer faults the trial court for instructing the jury to find proximate causation in connection with Sorrell's alleged contributory negligence. Instead, it faults the trial court for failing to require proof of proximate causation in connection with Sorrell's negligence claim against the railroad. Disavowing the relaxed standard of causation it repeatedly and consistently advocated below, Norfolk Southern now argues for the first time that the FELA's causation requirement "is an elaboration of the common-law rule of proximate causation." Br. of Pet'r at 26. Its central argument to this Court is that a FELA "plaintiff must prove that negligence was the proximate cause in whole or in part of the employee's injury." *Id.* at 27 (internal quotation marks omitted); *see also id.* at 26 (arguing that the FELA is "an elaboration of the common-law rule of proximate causation"); *id.* at 50 (arguing that it is entitled to a new trial in which the court instructs the jury "that both defendant negligence and plaintiff contributory negligence are measured by the same causal yardstick – proximate cause.").

---

[11] In Norfolk Southern's reply to the petition for certiorari, it claimed that determining the proper causation standard for defendant's negligence is "'predicate to intelligent resolution' of whether the standards for plaintiff and defendant negligence are the same." Br. of Pet'r at 7. But Norfolk Southern had no difficulty in the state court, separately and solely challenging the causation standard for plaintiff's contributory negligence, offering as justification for that position that the standard for contributory negligence and negligence should be the same. Likewise, in its merits brief, Norfolk Southern has solely and separately challenged the causation standard for defendant's negligence. Norfolk Southern's actions prove that the two questions – the proper causation standard for defendant's negligence and plaintiff's contributory negligence – are not inextricably intertwined.

Norfolk Southern has even changed its reading of this Court's opinion in *Rogers*, the critical case governing the issues in this appeal, *see infra* Part II. Below, Norfolk Southern argued that this Court's decision in *Rogers* stands for the proposition that "the traditional proximate cause test . . . is *not* appropriate in a FELA case." Application for Transfer at 5 (emphasis added); *see also* Br. at 30 (describing *Rogers* as rejecting the "traditional proximate cause test"). Now, Norfolk Southern reads *Rogers* to mean the exact opposite, contending that *Rogers* "reaffirms the traditional proximate-causation standard under FELA . . . ." Br. of Pet'r at 38.

Accordingly, Sorrell cannot be faulted for not pointing out in his Brief in Opposition Norfolk Southern's obvious waiver of this question in the state courts below. The Petition failed to put him on notice that he had any need to do so. Only a single sentence in the Petition even so much as alludes to any possible argument that the FELA requires proof of proximate cause for railroad negligence. *See* Pet. 14-15 ("The predicate rule in Missouri that FELA eliminates the proximate cause requirement for railroad negligence is contrary to federal law . . . but at a minimum this Court should not allow a substantial and unjustified circuit conflict to persist.") Respondent cannot fairly be expected to have extrapolated from such a passing side remark that Norfolk Southern would completely reverse course in this Court from the position it repeatedly and consistently took below. As this Court has made clear, "[i]t would be unreasonable to require a respondent on pain of waiver to object at the certiorari stage . . . to the petitioner's . . . failure to preserve any questions fairly included within the questions presented but uncontested earlier." *Kibbe*, 480 U.S. at 260.[12]

---

[12] In any event, under Rule 15.2, this Court retains discretion to entertain objections that a respondent does not raise in a brief in opposition. This Court should consider whether Norfolk Southern has properly raised its objection to the trial court's negligence

Norfolk Southern has wholly abandoned the question that it repeatedly presented to the Missouri courts – whether the plaintiff's contributory negligence in a FELA case should be subject to the relaxed standard of causation that is applied to a railroad's negligence. In its place, Norfolk Southern now argues for the first time that a uniform proximate causation standard should apply to both railroad negligence and employee contributory negligence. Since Norfolk Southern not only failed to present this argument to the courts below, and indeed has flipped its argument and taken a wholly inconsistent position, this Court should dismiss the writ as improvidently granted.

II. THE FELA REQUIRES A RELAXED CAUSATION STANDARD FOR RAILROAD NEGLIGENCE, NOT PROXIMATE CAUSE AS NORFOLK SOUTHERN INCORRECTLY ASSERTS.

If this Court reaches the merits of Norfolk Southern's claim that the railroad negligence instruction is inconsistent with the FELA, it should affirm. In the first place, it is difficult to see how the trial court could have erred in giving the jury an instruction that exactly mirrors the language of the statute. *Compare* J.A. 14 *with* 45 U.S.C. § 51.[13]

Even more important, in *Rogers*, this Court squarely held that the FELA has a relaxed standard of causation for railroad negligence. Rejecting an earlier Missouri Supreme Court decision requiring that a FELA plaintiff demonstrate that a

---

instruction as a "'predicate to an intelligent resolution' of the question presented." *Ohio v. Robinette*, 519 U.S. 33, 38 (1996) (quoting Rule 14.1(a)). Clearly, Norfolk Southern has not done so.

[13] As this Court has observed, the language of this portion of the FELA is "simple and direct." *Coray v. Southern Pac. Co.*, 335 U.S. 520, 524 (1949); *see also Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 607 (10th Cir. 1997) (upholding jury instruction tracking the language of the FELA).

railroad's negligence proximately caused his injury, the Court construed the FELA to require only a relaxed standard of causation. In the nearly 50 years since *Rogers*, all eleven circuits that have applied *Rogers* have recognized that it rejected the proximate cause requirement for railroad negligence in the FELA cases in favor of a more relaxed causation standard. Congress has not seen fit to amend the Act to overrule or modify that interpretation. Principles of *stare decisis* therefore suggest that this Court should not lightly reconsider such a well-established precedent.

Norfolk Southern tries to explain away *Rogers* as a case that speaks only to issues of multiple causation. *See* Br. of Pet'r at 30-36. This interpretation, however, is inconsistent with its own position in the Missouri courts, *see supra* 9-11, and in this Court just four terms ago in the most recent FELA case to be decided by this Court.[14] Equally important, Norfolk Southern's most recent interpretation of *Rogers* is inconsistent with the FELA's history, at odds with this Court's decisions, and contradicted by the uniform understanding of the eleven circuits that have applied *Rogers*. Any such radical departure from precedent as Norfolk Southern suggests can properly be directed only to Congress.

---

[14] *See* Brief of Petitioner at ii, *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003) (No. 01-963) ("Petitioner Norfolk & Western Railway Company no longer exists as a separate entity and has been merged into the Norfolk Southern Railway Company, . . ."), 45 (the FELA "permit[s] plaintiffs to establish liability under a reduced standard of causation, *Rogers*."), 46 ("FELA's reduced causation standard"), 47 ("As discussed above, a FELA plaintiff can often recover from a railroad under the reduced causation requirement set forth in *Rogers*.").

A. Congress Lowered The Causation Standard for Railroad Negligence In Order To Serve The FELA's Purpose Of Facilitating Worker Recovery.

Recognizing that the common law was not providing adequate compensation for railroad worker injuries, Congress, in enacting the FELA, decided to "shif[t] part of the 'human overhead' of doing business from employees to their employers." *Gottshall*, 512 U.S. at 542 (quoting *Tiller v. Atlantic Coast Line R.R. Co.*, 318 U.S. 54, 58 (1943)); *see also* S. Rep. No. 60-460, at 2 (1908) (explaining that the FELA was designed "to allow the burden of accident and misfortune to fall, not upon a single helpless family, but upon the business in which the workman is engaged; that is upon the whole community" and therefore "to effect this reasonable reformation of [the] industrial code"). It designed the statute "to lift from employees the 'prodigious burden' of personal injuries which that system had placed upon them, and to relieve men 'who by the exigencies and necessities of life are bound to labor' from the risks and hazards that could be avoided or lessened 'by the exercise of proper care on the part of the employer in providing safe and proper machinery and equipment with which the employee does his work.'" *Wilkerson v. McCarthy*, 336 U.S. 53, 68 (1949) (Douglas, J., concurring) (quoting H.R. Rep. No. 60-1386 at 2 (1908)). Thus, this Court has recognized generally that the FELA is a broad remedial statute, and has adopted a "standard of liberal construction in order to accomplish [Congress'] objects." *Urie*, 337 U.S. at 180; *see also Gottshall*, 512 U.S. at 543.

Although Congress stopped short of imposing automatic liability on employers as workers' compensation laws do, it nevertheless used those laws, then prevalent in Europe, as a standard. *See* 42 Cong. Rec. 4527, 4536 (1908). Consequently, Congress deliberately relaxed many of the demanding requirements of the common law of negligence. *See, e.g., Gottshall*, 512 U.S. at 542-43; 45 U.S.C. §§ 51-55. This

relaxation reflected Congress' intention that the jury should be the primary mechanism for ensuring compensation for injured workers in its hybrid system. As explained in *Bailey v. Central Vermont Railway, Inc.*, 319 U.S. 350 (1943), the right to trial by jury:

> is part and parcel of the remedy afforded railroad workers under [the FELA]. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply those standards to the facts of these personal injuries.

Id. at 354. "[T]o deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them." *Id.*

Indeed, Congress amended the FELA in 1939 to ensure that this goal of expanding compensation for workers was not thwarted by judicial introduction of common law concepts into the statute. *See Rogers*, 352 U.S. at 508-09.[15] It also expressly declined a revision to the FELA that would have equated the "in whole or in part" language of section 1 with proximate cause.[16]

---

[15] This intent to clarify that FELA departs from the common law undermines any reliance upon the FELA decisions predating the 1939 amendments. *See* Br. of Pet'r at 27-29, 38-39. Although Norfolk Southern also cites some decisions after 1939, none of these cases actually strikes down a claim based upon the submission of tenuous causation evidence. Moreover, while some of these cases refer to proximate cause, as the Seventh Circuit recognized, *see infra* 35, the standard applied under the FELA was actually below the traditional proximate cause requirement.

[16] *Compare* 42 Cong. Rec. 10,710 (1939) (proposed amendment in 1939: "In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his

This Court furthers Congress' apparent and undisputed remedial goals for enacting the FELA by interpreting the language – "in whole or in part" – as imposing a lightened causation standard, not a proximate cause standard, for the railroad's negligence.[17] As the Senate Report accompanying the 1908 Act put it, Congress intended the railroad to be responsible for "the loss which arises from an accident which befalls one of [its employees]." S. Rep. No. 60-460, at 3 (1908). To interpret the FELA as requiring strict adherence to traditional proximate cause would be inconsistent with the "humanitarian purposes" at the FELA's core, as it would push railroad workers closer to the traditional common law scheme that Congress was seeking to avoid. *See Gottshall*, 512 U.S. at 542-43.

---

employment in any case where . . . the negligence of such common carrier, its officers, agents, or employees, *proximately contributed* to the injury or death of such employees.") (emphasis added) *and* H.R. Rep. No. 75-2153, at 1 (1938) (similar proposed amendment in 1938) *with* 45 U.S.C. § 54 ("In any action brought against any common carrier . . . such employee shall not be held to have assumed the risks of his employment in any case where such injury or death *resulted in whole or in part* from the negligence of any of the officers, agents, or employees of such carrier . . .") (emphasis added). Norfolk Southern takes from this rejection that the "plain inference is that the term ['proximately'] was unnecessary." Br. of Pet'r at 34. However, a more plausible inference is that in rejecting the proximate cause standard in section 4 when characterizing the railroad's liability for its negligence, Congress likewise did not intend to incorporate proximate cause into section 1 regarding that same liability.

[17] Norfolk Southern suggests that in 1908, the courts universally interpreted the phrase "in whole or in part" as referring to instances of multiple causation, but the cases it cites neither interpret that language in a statutory context nor consider whether the phrase bears on the applicable causation standard. Br. of Pet'r at 29-31.

B. In *Rogers*, This Court Held That The FELA Does Not Require Proof Of Proximate Causation For Railroad Liability.

In *Rogers v. Missouri Pacific Railroad Co.*, 284 S.W.2d 467 (Mo. 1955) (also a state court case tried in Missouri), plaintiff James Rogers sued under the FELA to recover for the injuries that he sustained after falling into a drainage culvert while burning weeds on the defendant's right of way. Rogers alleged that his employment for defendant required that he use a hand torch to burn weeds in close proximity to the defendant's tracks. *Id.* at 468. While doing so, the wind from a passing train caused the fire to come dangerously close to him, such that he retreated quickly for fear of being engulfed in flames. *Ibid.* He came across an area of loose and sloping gravel that did not provide him sufficient footing, and he fell into the culvert. *Ibid.* Rogers' FELA suit alleged that defendant had failed to exercise ordinary care and had provided him with a dangerous method and place of work. *Ibid.* The railroad moved for a directed verdict, contending, *inter alia*, that "there was no evidence that plaintiff's alleged injury was proximately caused by the method adopted by the defendant in burning the weeds." *Id.* at 470. The trial court overruled the motion, and the jury found in favor of Rogers. *Id.* at 468, 470.

Agreeing with the railroad that the trial court erred in overruling the motion for directed verdict, the Missouri Supreme Court held that for the railroad's negligence to be actionable under the FELA, "there must not only be a causal connection so that the injury would not have occurred but for the negligence, but such negligence must also be a proximate (legal) cause of the injury." *Id.* at 471. Applying that standard to the facts of the case, the court reversed the jury's verdict in favor of Rogers because it concluded that there was insufficient evidence that the railroad's negligence proximately caused Rogers' injury in light of Rogers' intervening action in retreating from the flames. *Id.* at 472.

After granting certiorari "to prevent [FELA's] erosion by narrow and niggardly construction," *Rogers*, 352 U.S. at 509, this Court reversed, chastising the Missouri Supreme Court for "fail[ing] to take into account the special features of this statutory negligence action that make it significantly different from the ordinary common-law negligence action." *Id.* at 509-10. This Court explained that the Missouri Supreme Court had used the "language of proximate causation which makes a jury question dependent upon whether the jury may find that the defendant's negligence was the sole, efficient, producing cause of injury." *Id.* at 506. This Court continued, however, holding that the proximate cause standard was inapplicable in a FELA case:

> Under [the FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence *played any part, even the slightest, in producing the injury or death* for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence.

Id.

In so holding, the Court sought to vindicate "the basic congressional intention to leave to the fact-finding function of the jury the decision of . . . whether employer fault *played any part in the employee's mishap*." *Id.* at 509 (emphasis added). Thus, this Court understood that "the inquiry in [FELA] cases . . . rarely presents more than the single question *whether negligence of the employer played any part, however small, in the injury or death* which is the subject of the suit," *Id.* at 508 (emphasis added).

It is therefore apparent that, in *Rogers*, this Court resolved the issue of whether the FELA requires proof of

proximate causation for a railroad to be liable, definitively holding that it does not.

C. The Holding In *Rogers* Is Well-Established.

1. *This Court Has Repeatedly Reaffirmed That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability.*

Tellingly, Norfolk Southern does not point to one post-*Rogers* decision where this Court has stated that proximate cause is the standard for railroad liability under the FELA. Indeed, after *Rogers*, this Court has repeatedly recognized that a FELA plaintiff need not demonstrate that a railroad's negligence proximately caused his injury. For example, in *Crane v. Cedar Rapids & Iowa City Railway Co.*, 395 U.S. 164 (1969), this Court explained that, unlike common law tort actions that are governed by state law, a FELA plaintiff "is not required to prove common-law proximate causation but only that his injury resulted 'in whole or in part' from the railroad's" negligence. *Id.* at 166 (quoting 45 U.S.C. § 51). Similarly, in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994), this Court provided *Rogers* as an example of its liberal construction of the FELA, stating that the Court had "held . . . that a relaxed standard of causation applies under FELA." *Id.* at 543; *see also Ayers*, 538 U.S. at 161-62 (reiterating that it is "'irrelevant' . . . 'whether the immediate reason' for an employee's injury was the proven negligence of the defendant railroad or 'some cause not identified from the evidence'") (quoting *Rogers*, 352 U.S. at 503).

Moreover, since *Rogers*, this Court has applied a relaxed causation standard to railway negligence in the FELA cases on numerous occasions. For instance, in *Gallick v. Baltimore & Ohio Railroad Co.*, 372 U.S. 108 (1963), this Court reversed a state appellate court's decision to enter judgment – contrary to a jury verdict – for the railroad, where the employee had to have both of his legs amputated after being bitten by an insect while working around a stagnant pool of

water of which the railroad had been aware. *Id.* at 109. Although the state appellate court had held that there was a break in the causal chain that turned it into a mere "series of guesses and speculations," this Court disagreed, holding that there was enough evidence "to justify a jury's determination that employer negligence had played *any role* in producing the harm," which was all the statute required. *Id.* at 112, 116 (emphasis added).[18]

Similarly, in *Dennis v. Denver & Rio Grande W. R.R. Co.*, 375 U.S. 208 (1963) (per curiam), this Court reinstated a jury verdict for plaintiff despite the fact that there was sufficient evidence to conclude that the plaintiff's own contributory negligence was the sole cause of his frostbite. *Id.* at 210. Relying on *Rogers*, this Court said, "Once it is shown that 'employer negligence played any part, even the slightest, in producing the injury,' a jury verdict for the employee may not be upset on the basis of his own negligence, no matter how substantial it may have been . . . ." *Ibid.* (quoting *Rogers*, 352 U.S. at 506); *see also Inman v. Baltimore & Ohio R.R. Co.*, 361 U.S. 138, 140 (1959) (affirming reversal of judgment in favor of railroad crossing watchman who was hit by intoxicated driver while on duty flagging traffic for a passing train because "the evidence here was so thin that, on a judicial appraisal, the conclusion must be drawn that negligence on the part of the railroad could have played *no part* in petitioner's injury") (emphasis added).

Norfolk Southern contends that this Court in *Kernan v. American Dredging Co.*, 355 U.S. 426, 434 (1958) indirectly affirmed proximate cause as the appropriate standard for railroad negligence. Br. of Pet'r at 41 n.20. But *Kernan* did not concern causation at all and instead addressed whether the

---

[18] Eight Justices agreed that the lower court had improperly reversed the judgment based on causation. *See Gallick*, 372 U.S. at 114-17; *Id.* at 126 (Stewart , J., dissenting).

Jones Act imposes liability for violation of a statutory duty when the injury is not one that the statute was designed to prevent. *Id.* at 432-33. The only direct statements in that decision concerning causation echo the language of *Rogers* and the FELA: "[T]he theory of the FELA is that where the employer's conduct falls short of the high standard required of him by this Act, and his fault, in whole or in part, causes injury, liability ensues." *Id.* at 438-39.

Thus, this Court has repeatedly interpreted *Rogers* to hold that proof of proximate causation is not required for railroad liability, and, it has embraced and applied that holding on numerous occasions.

2. *The Courts of Appeals Have Uniformly Recognized That The FELA Does Not Require Proof of Proximate Causation for Railroad Liability.*

In its Petition for Certiorari, Norfolk Southern conjured before this Court a circuit conflict on the issue of whether the causation standard for plaintiff's contributory negligence is the same as the lightened causation standard for defendant's negligence. Pet. 13-15. But there is no circuit conflict at all on the only relevant issue Norfolk Southern now argues, namely, whether railroad negligence under the FELA requires a showing of proximate causation. To the contrary, on this new issue, there is circuit unanimity that it does not.

Of the eleven circuits that have addressed the issue, all eleven have understood *Rogers* and its progeny to stand for the proposition that railroad negligence under the FELA is subject to a more relaxed causation standard than would be required in a traditional common law negligence action. For example, the Fourth Circuit has recognized that "to further the remedial goals of the FELA . . . the Supreme Court has relaxed the standard of causation by imposing employer liability whenever 'employer negligence played any part, even the slightest, in producing the injury or death for which dam-

ages are sought.'" *Hernandez v. Trawler Miss Vertie Mae, Inc.*, 187 F.3d 432, 436 (4th Cir. 1999) (quoting *Gottshall*, 512 U.S. at 543). The Tenth Circuit has understood this Court in *Rogers* to have "definitively abandoned" any reliance on the language of proximate causation to analyze the FELA liability. *See Summers v. Mo. Pac. R.R. Sys.*, 132 F.3d 599, 606-07 (10th Cir. 1997). Moreover, relying on *Rogers*, the Seventh Circuit has recently stated that a plaintiff's "lighter burden of proof" in the FELA cases permits him to "more easily survive a motion for summary judgment." *Holbrook v. Norfolk S. Ry. Co.*, 414 F.3d 739, 741-42 (7th Cir. 2005).

Such statements by the Fourth, Seventh, and Tenth Circuits are representative of the other circuits' assessments of the FELA requirements for railroad negligence. *See, e.g.*, *Napier v. F/V DEESIE, Inc.*, 454 F.3d 61, 67 (1st Cir. 2006) (to satisfy his "burden to prove causation," plaintiff "need only demonstrate that [the defendant's] 'negligence played any part, even the slightest, in producing the injuries for which the plaintiff seeks damages'"); *Williams v. Long Island R.R. Co.*, 196 F.3d 402, 406 (2d Cir. 1999) ("a relaxed standard applies in FELA cases"); *Syverson v. Consol. Rail Corp.*, 19 F.3d 824, 826 (2d Cir. 1994) ("the standard of fault springs from statute as opposed to common-law analysis"); *Hines v. Consol. Rail Corp.*, 926 F.2d 262, 267-68 (3d Cir. 1991) ("concept of causation under FELA is also broadly interpreted" such that "injury need not be an immediate result of an accident"); *Gautreaux v. Scurlock Marine, Inc.*, 107 F.3d 331, 335 (5th Cir. 1997) (en banc) (*Rogers* "used the term 'slightest' to describe the reduced standard of causation between the employer's negligence and the employee's injury in FELA" cases); *Richards v. Consol. Rail Corp.*, 330 F.3d 428, 433-34 (6th Cir. 2003) (*Rogers* "adopted this relaxed standard in order to effectuate Congress' intent when it amended FELA in 1939 'to preserve the plaintiff's right to a jury trial'"); *Fletcher v. Union Pac. R.R. Co.*, 621 F.2d 902,

909 (8th Cir. 1980) ("test of causation under the FELA is whether the railroad's negligence played any part, however small, in the injury"); *Oglesby v. S. Pac. Transp. Co.*, 6 F.3d 603, 606-09 (9th Cir. 1993) ("the standard of causation required under the FELA differs from common-law proximate causation"); *Little v. Nat'l R.R. Passenger Corp.*, 865 F.2d 1329 (Table), 1988 WL 145095, 1 (D.C. Cir. 1988) ("the distinguishing feature of FELA cases [is] that [the plaintiff] need not prove the [defendant's] negligence was the proximate cause of its injury, only that it played a part"); *Fare v. S. Ry. Co.*, 438 F2d 933, 934 (11th Cir. 1971) (following the principle that "the plaintiff's burden of proof in an FELA case is 'much less than the burden required to sustain recovery in ordinary negligence actions.'")

Amicus curiae, Association of American Railroads (AAR), cites a handful of state cases that it contends apply the traditional common-law causation standard to railroad liability, but the existence of such an extreme minority of dissenting views does not justify a departure from the otherwise overwhelmingly uniform interpretation of *Rogers* that state and federal courts have given it. *See* AAR Amicus Br. at 9-10. Moreover, any mention of the proper causation standard in those cases was dicta, as the proper causation standard for railroad negligence was not at issue in any of them. *See id.*

D. *Rogers* Was Not Merely Concerned With Comparative Negligence.

In an effort to reduce railroads' responsibility for injuries to their employees in this inherently dangerous industry, Norfolk Southern now proposes that *Rogers* speaks only to issues of multiple causation. Contrary to Norfolk Southern's contention, this Court was squarely focused on the causation requirements for railroad negligence and the causation standard that the plaintiff must demonstrate to get to the jury in an FELA case.

Indeed, contrary to Norfolk Southern's contention, the issue of proximate causation was a critical issue that was briefed by both parties in *Rogers*. In fact, the purported basis for the railroad's motion for a directed verdict (a motion the trial court denied, prompting the Missouri Supreme Court to reverse) was the absence of proximate cause. *See Rogers*, 284 S.W.2d at 470. Rogers' brief in this Court expressly argued the contrary: "Certainly there should be no question as to the causal relationship between respondent's negligence and petitioner's injury in view of the broadened concept of 'proximate cause' under the Federal Employers' Liability Act." Brief of Petitioner at 24, *Rogers v. Missouri Pac. R.R. Co.*, 352 U.S. 500 (1957) (No. 56-28).

Rogers also relied on authority suggesting that a railroad would be liable if its negligence was "among [the] causes" of injury to the employee even if some other factor was "logically nearer to, or more influential in producing that injury." *Id.*, at 24-25. Rogers' brief spent considerable space elaborating that the FELA has displaced "the old concept of proximate cause," and read the "in whole or in part" language of the statute in particular to have been the source of this change in the common law: "Now, if the negligence of the railroad has 'casual' [sic] relation' – if the injury or death resulted '*in part*' from defendant's negligence, there is liability." *Id.* at 25.

While the railroad's brief in *Rogers* did not address proximate causation in any detail, focusing instead on argument that the railroad had violated no duty of care, the Respondent devoted most of its Petition for Rehearing to arguing, unsuccessfully, that the Court's opinion in *Rogers* "in effect discards the entire theory of proximate cause. The Court now says that if the employer's negligence played *any part, even the slightest*, in producing the injury, there is liability." Pet. for Reh'g at 4, *Rogers*, 352 U.S. 500. The railroad argued to no avail that the common law concept of proximate cause should "remain unchanged" by avoiding

"placing overemphasis upon the 'in whole or in part' portion of the statute." *Id.* at 5.

After considering these arguments, this Court could not have been more clear that it was expressly repudiating the Missouri Supreme Court's invocation of the "language of proximate causation" for railroad negligence. *Rogers*, 352 U.S. at 506. The decision's central passage speaks for itself:

> Under [the FELA] the test of a jury case is simply whether the proofs justify with reason the conclusion that employer negligence *played any part, even the slightest, in producing the injury or death* for which damages are sought. It does not matter that, from the evidence, the jury may also with reason, on grounds of probability, attribute the result to other causes, including the employee's contributory negligence. Judicial appraisal of the proofs to determine whether a jury question is presented is narrowly limited to the single inquiry whether, with reason, the conclusion may be drawn that *negligence of the employer played any part at all in the injury or death*. . . . The statute expressly imposes liability upon the employer to pay damages for injury or death due 'in whole or in part' to its negligence.

Id. at 506-07.

Although *Rogers* certainly addressed the role of plaintiff's contributory negligence, it did so only in the broader context of what evidence was necessary to present a jury question on whether a defendant's negligence caused plaintiff's injury. Thus, this Court broadly held that "the Congress vested the power of decision in [FELA] actions exclusively in the jury in all but the infrequent cases where

fair-minded jurors cannot honestly differ whether fault of the employer played any part in the employee's injury." *Id.* at 510 (emphasis added). This possibility is not hypothetical. *See Inman, supra.* Any suggestion that only comparative negligence was at issue in *Rogers* is quite simply, wrong.

E. *Rogers* Is Consistent With The FELA Decisions That Came Before It.

Norfolk Southern also seeks to evade *Rogers* by portraying this Court's pre-*Rogers* FELA jurisprudence as uniformly applying traditional notions of proximate causation, such that there would be no reason to interpret *Rogers* as departing from that mold. The fact that pre-*Rogers* decisions use the term "proximate cause" in FELA cases provides no insight into the meaning of that term, because not until *Rogers* was this Court given the opportunity to address the appropriate causation standard for railroad negligence. In all of the earlier decisions, the Court's use of that term was not essential to its decision. Moreover, when the Court referenced proximate cause in its pre-*Rogers* decisions, it did not give the term the standard meaning that it has now come to enjoy.

For example, *Rogers* cites *Coray v. Southern Pacific Co.*, 335 U.S. 520 (1949), which suggested an FELA plaintiff must show that the railroad's negligence was the proximate cause of his injuries, for the proposition that railroad negligence need only have "played any part, even the slightest, in producing the injury or death for which damages are sought." *Id.* at 523; *Rogers*, 352 U.S. at 506 & n.11. In *Coray*, this Court reversed a judgment in favor of a railroad, despite the tenuous causal connection between the railroad's negligence and the employee's injury, a connection that the state supreme court described as merely philosophical and not substantial. *Coray*, 335 U.S. at 523. There, the evidence showed that the motor truck car that the employee was operating crashed into a train that it had been following (at a similar rate of speed) because the first train suddenly stopped due

to defective brakes and the deceased did not see the stopped train, as he was looking in another direction. *Id.* at 521. This Court explained that the FELA "declares that railroads shall be responsible for their employees' deaths 'resulting in whole or in part' from" the railroads' negligence, and therefore it "has commanded that if a breach of [its duty of care] contributes in part to an employee's death, the railroad must pay damages." *Id.* at 524; *see also Schulz v. Pa. R.R. Co.*, 350 U.S. 523, 526 (1956) (reversing directed verdict for employer in Jones Act claim, which incorporates the FELA, because "[f]act finding does not require mathematical certainty" and that the railroad was liable if its employee's death "resulted 'in whole or in part' from [its] negligence.").

Indeed, the Seventh Circuit understood this Court's use of the term "proximate cause" in the early FELA cases to deviate from the traditional definition of the term. As that court explained:

> Perhaps the reconciliation of the earlier accepted, sometimes called the old-fashioned idea, of 'proximate cause' as the direct or efficient cause of the accident . . . in cases where [the FELA] applies, and the conception of proximate cause which now obtains, is to be found in the enlarging phrase of the statute. It provides that if the railroad's negligence 'in part' results in the injuries or death, liability arises. Under the old concept of proximate cause, that cause must have been direct, the complete, the responsible, the efficient cause of the injury. Contributing and remotely related causes were not sufficient. Now, if the negligence of the railroad has 'causal relation,' – if the injury or death resulted 'in part' from defendants' negligence, there is liability. The words 'in part' have

> enlarged the field or scope of proximate causes in these railroad injury cases.

Eglsaer v. Scandrett, 151 F.2d 562, 565-66 (7th Cir. 1945); *see also O'Day v. Chicago River & Ind. R.R. Co.*, 216 F.2d 79, 83 (7th Cir. 1954). The Second Circuit likewise understood early on that proximate causation "in cases where the liability depends upon a failure of foresight" by the railroad should be further refined, such that a railroad would be liable where "the chain of events which resulted in plaintiff's injuries were [sic] not . . . beyond calculable foresight." *Cusson v. Canadian Pacific Ry. Co.*, 115 F.2d 430, 432 (2d Cir. 1940) (Hand, J.).

Thus, long before *Rogers*, this Court, as well as lower courts, had already recognized that the traditional understanding of proximate causation was inconsistent with the FELA's negligence scheme.

F. Norfolk Southern's Policy Arguments Do Not Justify Judicially Overruling *Rogers* in Violation of *Stare Decisis*.

Norfolk Southern spends much of its brief arguing that, for policy-related reasons, the FELA is best interpreted to incorporate the traditional proximate causation requirement. These arguments are not only incorrect, but also ignore the impact of the *Rogers* decision. Because it has been established for nearly half a century that the FELA has a relaxed causation standard, the Court is not free to reject that standard based upon its views of its wisdom. To the contrary, the doctrine of *stare decisis* requires that such decisions be made by Congress alone.

Stare decisis "promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process." *Randall v. Sorrell*, 126 S. Ct. 2479, 2489 (2006) (internal quotations omitted). For

these reasons, "the rule of law demands that adhering to [this Court's] prior case law be the norm." *Id.* As Norfolk Southern recognizes, Br. of Pet'r at 40, considerations of *stare decisis* weigh particularly heavily "in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 736 (1977); *accord Hilton v. South Carolina Public Railways Com'n*, 502 U.S. 197, 202 (1991).

This Court has applied the principle of *stare decisis* in the specific context of the FELA, recognizing "that Congress' failure to disturb a consistent judicial interpretation of a statute may provide some indication that 'Congress at least acquiesces in, and apparently affirms, that [interpretation].'" *Monessen Southwestern Ry. Co. v. Morgan*, 486 U.S. 330, 338 (1988) (quoting *Cannon v. University of Chicago*, 441 U.S. 677, 703 (1979)). In *Morgan*, lower courts had with "virtual unanimity over more than seven decades" ruled that the FELA did not provide for prejudgment interest. 486 U.S. at 338. Although this Court had not addressed the issue, it nevertheless refused "in the face of such congressional inaction to alter the longstanding apportionment between carrier and worker of the costs of railroading injuries." *Id.* at 339. It would be equally inappropriate here to retreat from a statutory interpretation this Court and the courts of appeals have embraced for the past 50 years without modification by Congress. *See, e.g., Heater v. Chesapeake & Ohio Ry. Co.*, 497 F.2d 1243, 1246 (7th Cir. 1974) ("We will not assume that Congress is unaware of the judicial gloss that the Act has received. If the Act as it has been interpreted and applied does not correctly reflects what was intended by the legislative branch then the change must be made there.").

Norfolk Southern offers numerous supposed policy considerations – the proverbial parade of horribles – in favor of rejecting FELA's lightened causation standard for railroad negligence, but none are persuasive even if the Court were to seek to legislate where Congress has not. Remarkably, Nor-

folk Southern contends that using the lightened causation standard that has been in place for at least 50 years will lead to "dramatic and unwarranted expansion of railroad liability, and . . . absurd results." Br. of Pet'r at 44. If that were truly the case, the flood gates would have opened long ago, as the courts have successfully tried thousands of cases under that standard for nearly 50 years without significant incident. Indeed, the only way in which this Court's decision here could create a dramatic change in railroad liability would be if it abandoned the nearly uniform, half-century interpretation of the FELA as allowing railroad liability on a showing of less than proximate cause.

Norfolk Southern also argues incorrectly that the relaxed standard of causation for railroad negligence has led to excessive and effectively limitless liability for railroads. This has been the standard response of the railroads to every departure the FELA made from the harshness of the common law, and it is equally unavailing here. Railroads routinely prevail in the FELA cases, where appropriate.[19]

Even the cases that Norfolk Southern offers as examples of allegedly outrageous instances of liability come squarely within Congress' intended interpretation of the FELA. *Parker v. Atchison, Topeka & Santa Fe Railway*, 263 Cal.

---

[19] *See, e.g., Clark v. Mo. & N. Ark. R.R. Co., Inc.*, 157 S.W.3d 665 (Mo. Ct. App. 2004) (affirming jury verdict in favor of railroad); *Travis v. Kansas City S. Ry. Co.*, 977 S.W.2d 512 (Mo. Ct. App. 1998) (affirming judgment not withstanding the verdict in favor of railroad); *Messick v. Atchison, Topeka & Santa Fe Ry. Co.*, 924 S.W.2d 620 (Mo. Ct. App. 1996) (affirming jury verdict in favor of railroad); *York v. Missouri Pacific R. Co.*, 813 S.W.2d 61 (Mo. Ct. App. 1991) (same); *Turner v. Norfolk & Western Ry. Co.*, 785 S.W.2d 569 (Mo. Ct. App. 1990) (same); *Eickelman v. Illinois Cent. Gulf R. Co.*, 714 S.W.2d 611 (Mo. Ct. App. 1986) (same)

App. 2d 675 (Cal. Ct. App. 1968), for example, cited by Norfolk Southern as an example of runaway liability, involved a worker who sustained injuries when he fell twice in the railroad yard due to ruts and accumulated oil. *Id.* Permitting liability in that case was consistent with Congress' express intention that the failure to maintain the railroad yard is actionable negligence. *See* S. Rep. No. 84-661, at 4 (1939) (the railroad "may be negligent in allowing his road, or his yard, to become littered with debris"). Likewise, in *Peters v. CSX Transp., Inc.*, No. 04-CV-077, 2006 WL 42179 (W.D. Ky. Jan. 3, 2006), another case cited by Norfolk Southern as an outrageous decision, the employee claimed that the railroad's negligence was a causal contribution to his injury, even though third parties may have also contributed. *Id.* at *2 (alleging railroad negligently failed to place warning signs in advance of the barricaded area where plaintiff was struck by a car). *Peters* is completely consistent with *Ayers*, in which this Court dispelled any doubt that the railroad was liable in such instances of multiple causation. *See Ayers*, 538 U.S. at 159-66. In sum, there was nothing untoward in the imposition of liability in the cases that Norfolk Southern offers as examples of the purportedly unreasonable scope of the FELA. *See also Bailey v. Norfolk & W. Ry.*, 942 S.W.2d 404, 408 (Mo. Ct. App. 1997) (alleging railroad negligence in providing unsafe conditions in its sleeping facilities).

Norfolk Southern also worries about its ability to recover compensation from other tortfeasors if the railroad can be liable under a standard of less than proximate cause. Nothing in the legislative history suggests Congress shared this concern. Nowhere is it even hinted that Congress thought a railroad worker should bear the burden of no recovery just because the railroad may not be able to recover its payments to the employee arising out of its own negligence. At any rate, this case does not present that situation and resolution of the question of contribution is best left for another day.

In sum, Norfolk Southern has offered no persuasive reason for changing the long-standing interpretation of the FELA as permitting liability on a showing of less than proximate cause. Even if it had, such arguments are for Congress, not this Court.

III. THE INSTRUCTION BELOW CONTAINING DUAL CAUSATION STANDARDS WAS NOT REVERSIBLE ERROR.

Norfolk Southern has unquestionably abandoned its prior contention that a lightened causation standard applies to plaintiff's contributory negligence under the FELA by repeatedly conceding in its merits brief that the appropriate standard is proximate cause. *See, e.g.*, Br. of Pet'r at 3 (Congress "did not change the common-law causation standards . . . . [T]he negligence (or contributory negligence) must be a proximate cause . . . ."); 50 ("Proximate cause is the rule for both negligence and contributory negligence under FELA.") The Court should not allow Norfolk Southern to transform its argument yet again in its reply brief to somehow justify addressing this issue.

However, if this Court reaches the merits and addresses the question presented in the Petition, as opposed to the question as reframed and newly presented in Norfolk Southern's Brief, then it should affirm the Missouri court's judgment, notwithstanding the use of the "in whole or in part" standard in the instruction on railroad negligence, but not in the instruction on contributory negligence.

A. The FELA Creates A Workable System Where The Causation Standard For The Railroad's Negligence Is Lighter Than That Applicable To Plaintiff's Contributory Negligence.

As many commentators and courts have observed, proximate causation (despite its name) has more to do with scope of responsibility, than with causation. *See, e.g.*, Dan

B. Dobbs, *The Law of Torts*, ch. 10, § 180, at 443 (2001); W. Keeton, D. Dobbs, R. Keeton, & D. Owen, *Prosser and Keeton on Law of Torts* § 41, p. 264, 274-75 (5th ed. 1984); *Holmes v. Securities Investor Protection Corp.*, 503 U.S. 258, 268 (1992); *Palsgraf v. Long Island R.R. Co.*, 162 N.E. 99, 103 (N.Y. 1928) (Andrews, J., dissenting) ("What we do mean by the word 'proximate' is that, because of convenience, of public policy, of a rough sense of justice, the law arbitrarily declines to trace a series of events beyond a certain point"). By authorizing railroad liability on a showing of less than proximate cause, *see supra* Part II.A., Congress expanded the railroad's scope of responsibility – a result completely consistent with the legislative history.

But Congress, in this law benefiting injured railroad workers, evidenced no commensurate desire to lighten the causation standard for plaintiff's contributory negligence. Nor would the lightening of that standard have comported with Congress' unquestionable purpose in enacting the statute: shifting financial responsibility for injuries from the worker to the railroad. *See Ayers*, 538 U.S. at 161; *Gottshall*, 512 U.S. at 542. Thus, while Congress took care to use the phrase – "resulting in whole or in part" – in both the statutory section concerning defendant's negligence and the section abolishing assumption of the risk as a defense, it did not use any language signaling a departure from proximate causation with respect to plaintiff's contributory negligence. *See* 45 U.S.C. §§ 51, 53, 54. That is why the Missouri Supreme Court used different language in its contributory negligence instruction than it did in its negligence instruction. For contributory negligence, the traditional conception of proximate cause – a standard that best serves congressional goals of safety and compensation for railroad workers – continues to apply.

In arguing against divergent causation standards, Norfolk Southern contends that the FELA holds each party responsible for its own negligence, suggesting that this can only be

fairly achieved if the same causation standard applies to each party. Br. of Pet'r at 3, 8, 22. This argument oversimplifies the FELA. While injured workers are responsible for only their own negligence, that limitation of responsibility is not true as to the railroad, because the railroad's scope of liability extends beyond its own negligence to include the causal negligence of third-parties. *See Ayers*, 538 U.S. at 166. Thus, Norfolk Southern's contention that the FELA was intended to achieve perfect parity between workers and railroads is patently false.

Another example of this arises under the portion of the FELA which provides that a violation by the railroad of the former Boiler Inspection Act or the Safety Appliance Act creates automatic liability even if the employee was guilty of contributory negligence. *See* 45 U.S.C. § 53. This provision creates a lack of parity, but Congress intentionally did so to further the interests of railroad safety and enable worker recovery for railroad injuries.

Norfolk Southern's concern about the workability of a statutory scheme with dual standards of causation also misses the mark, as it misconstrues the nature of a comparative negligence regime. Br. of Pet'r at 22-24, 48-49. Contrary to Norfolk Southern's intimations, asking a jury to consider a proximate causation standard for an employee's contributory negligence and a relaxed causation standard for a railroad's negligence is not tantamount to comparing apples to oranges. Rather, the causation standards merely serve as a gatekeeper to determine which acts or omissions are relevant when assessing the parties' comparative fault. In other words:

> The sole function of a legal cause standard in this comparative negligence system is to signify when a comparison is to be made: under a dual standard of legal cause a comparison of negligence will be made whenever the defendant's negligence was

> the simple cause and the plaintiff's negligence the common-law proximate cause of the latter's injuries. Once the legal cause test indicates that a comparison is to be made, its function in the comparative negligence system is over. Then the acts or omissions of the plaintiff are balanced against the combined acts or omissions of both parties. . . [T]he increased degree of cause or culpability of one party when his acts or omissions were the proximate cause of the plaintiff's injury does not mean that his negligence cannot be compared with that of another party whose degree of cause or culpability is less . . . .

Charles H. Traeger, III, *Legal Cause, Proximate Cause, & Comparative Negligence in the FELA*, 18 STAN. L. REV. 929, 935 (1966). The jury instruction in this case reflected this exact conception of the relevant comparison as it informed the jury to reduce Sorrell's award "in proportion to the amount of negligence attributable to" him. L.F. 26.

Even assuming *arguendo* that these dual standards of causation do require some comparison between dissimilar types of actions, such comparisons are made by juries on a regular basis. For example, negligence under the traditional common law requires proof of proximate cause, while intentional conduct consists of conduct "substantially certain" to result in injury to another. *Blazovic v. Andrich*, 590 A.2d 222, 231 (N.J. 1991) (quoting *Restatement (Second) of Torts* § 8A comment b (1965)). Any comparison of fault between negligent and intentional conduct would require application of different causation standards. Yet, courts have allowed juries to balance a plaintiff's intentional conduct against defendant's negligence, (*see, e.g., Hickey v. Zezulka*, 487 N.W.2d 106, 123-24 (Mich. 1992)), and a plaintiff's negligence against defendant's intentional conduct, (*Barth v.*

Coleman, 878 P.2d 319, 320-21 (N.M. 1994); *Bonpua v. Fagan*, 602 A.2d 287 (N.J. Sup. Ct. App. Div. 1992); *see, e.g., Bisaillon v. Casares*, 798 P.2d 1368, 1369-70 (Ariz. Ct. App. 1990); *Morris v. Yogi Bear's Jellystone Park Camp Resort*, 539 So.2d 70, 77-78 (La. Ct. App. 1989); *Comeau v. Lucas*, 455 N.Y.S. 2d 871, 872 (N.Y. App. Div. 1982)). The comparative fault statutes of some states even expressly permit the comparison of plaintiff's negligence to defendant's intentional, reckless or willful conduct. *See, e.g.*, N.D. Cent. Code §32-03.2-02 (1993). These comparative schemes involving different causation standards have all proved workable. *See Hickey*, 487 N.W.2d at 124 (juries are "capable of reaching a rational and sensible balance between the" two parties' fault).

Moreover, allowing different causation standards for negligence and contributory negligence presents no more challenge to juries than they regularly face when considering a products liability claim based on a manufacturing defect or a maritime claim of unseaworthiness. A products liability claim based on a manufacturing defect and a maritime claim of unseaworthiness both impose strict liability on the defendant, so that the defendant's negligence is irrelevant. *See Restatement (Third) of Torts: Product Liability* § 2(a) (1998); *Seas Shipping Co. v. Sieracki*, 328 U.S. 85, 94 (1946). The jury must nevertheless compare plaintiff's contributory negligence, if any, to defendant's strict (non-negligent) liability to determine plaintiff's recoverable damages. *See Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 408-09 (1953) (plaintiff's negligence considered in determining recovery in unseaworthiness action); *Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 429 (1939); Romualdo P. Eclavea, *Applicability of Comparative Negligence Doctrine to Actions Based on Strict Liability in Tort*, 9 A.L.R. 4th 633 (1981 & Supp. 2005) (collecting cases from 25 States that apply comparative negligence to strict products liability).

The courts, including this Court, have found juries fully capable of making such a disparate comparison. *See, e.g., Fitzgerald v. United States Lines Co.*, 374 U.S. 16, 20 (1963) (unseaworthiness claim when joined with claim under the Jones Act is triable to a jury); *Miller v. Am. President Lines, Ltd.*, 989 F.2d 1450, 1462 (6th Cir. 1993) (The comparison of strict liability to comparative fault "appears to have posed little problem in cases tried by juries."); *Mulherin v. Ingersoll-Rand Co.*, 628 P.2d 1301, 1304 (Utah 1981) ("There may be semantic difficulties in comparing strict liability and negligence, but we believe that judges and juries will have no difficulty assigning the relative responsibility each is to bear for a particular injury when the ultimate issues in such comparisons are relative fault and relative causation."). Thus, there is no reason to think that juries cannot function effectively with dual standards of causation. They do all the time.

Even if a scheme with dual causation standards for negligence and contributory negligence is more difficult to administer than one with a single standard, that alone is not reason to conclude that Congress must have intended identical causation standards for both. Indeed, the House Report rejected just such an argument advanced by critics of the 1908 Act:

> It is not a just criticism of a law, conceding the righteousness of its principles, to say that it is impracticable of administration. We submit that the principle in this section is ideal justice, against which no fair argument can be made. It is better that legislatures pass just and fair laws, even though they may be difficult of administration by the courts, rather than to pass unjust and unfair laws because they may be more easily administered by the courts.

H. R. Rep. No. 60-1386, at 4 (1908). Thus, this Court's interpretation should be guided by its precedents and congres-

sional intent, and not some abstract objection that dual causation standards would somehow impede the judicial administration of the Act.

Since a dual scheme is both workable and consistent with this Court's precedents and the statutory scheme, the instruction below was not erroneous as a matter of law. Nothing in the FELA is to the contrary.

B. Any Error In Instructing The Jury Using A Proximate Cause Standard For Contributory Negligence Was Harmless.

Instructing the jury using "directly resulted" rather than "resulting in whole or in part" could not have affected the jury's verdict. For one reason, it is unlikely that the distinction between the two causation standards has any practical significance in any case. *See Page v. St. Louis Southwestern Ry. Co.*, 349 F.2d 820, 823 (5th Cir. 1965) ("At the outset, there is the doubt that such casuistries have any practical significance as the jury, undergoing its once in-a-lifetime exposure to the equivalent of a law school lecture, seeks to translate instruction into definitive answers . . . ."); *Caplinger v. Northern Pac. Terminal*, 418 P.2d 34, 36 (Or. 1966) ("It is not exactly clear what real difference the double standard instruction would make in the trial of a Federal Employers' Liability Act case.").

In this case in particular, it was simply not possible that instructing the jury using a proximate cause standard rather than a lightened causation standard for contributory negligence had any effect. Sorrell's only potential negligence resulted from the way in which he drove his truck – whether he pulled the truck too far to the side of the road, drove off the road, or pulled the truck too severely back onto the road. If the jury found that Sorrell was negligent in any of these ways, it must necessarily have also found that this negligence "directly contributed to cause his injury." Indeed, it is difficult to conceive of a cause to a vehicle accident that could be

any more direct than the driver's conduct. Thus, the instruction on contributory negligence, even if erroneous, did not affect the outcome of the trial, and reversal is not warranted. *See Carlisle Packing Co. v. Sandanger*, 259 U.S. 255, 259 (1922); *Deery v. Cray*, 77 U.S. 263, 272 (1869); *E. Transp. Line v. Hope*, 95 U.S. 297, 302-03 (1877).

Given the harmless nature of the error, if any, in this case, and Norfolk Southern's failure to discuss this issue in its opening brief, and instead to advocate an issue waived at every stage of the litigation, including the Petition, this Court should not address the contributory negligence causation issue. *Cf. Adams*, 520 U.S. at 90-92 (court benefits from fully developed factual and legal record).

CONCLUSION

The writ of certiorari should be dismissed as improvidently granted, or, alternatively, the judgment should be affirmed.

Respectfully submitted,

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART OLIVER & HEDGES, LLP
555 Twin Dolphin Drive
Redwood Shores, CA 94065
(650) 801-5000

JEROME J. SCHLICHTER
ROGER C. DENTON
MARY L. PERRY
Counsel of Record
SCHLICHTER, BOGARD & DENTON
100 South Fourth Street
Suite 900
St. Louis, MO 63102
(314) 621-6115

Counsel for Respondent

SEPTEMBER 7, 2006